MOTION FILED

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No. 92-1544

In The

# Supreme Court of the United States

October Term, 1992

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; AND BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF OF *AMICI CURIAE* NEW ENGLAND LEGAL FOUNDATION and ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the New England Legal Foundation ("NELF") and the Atlantic Legal Foundation ("ALF") move this Court for leave to file its brief amicus curiae (bound with this motion) in support of the petition for writ of certiorari.

NELF is a not-for-profit public interest legal organization. Since its founding in 1977, NELF's mission has been to use litigation to promote free market values and to protect the economic rights and freedoms of New England's citizens. NELF locates and litigates, without charging a fee, precedent-setting cases involving individual and corporate economic and property rights and unconstitutional or illegal government regulation of economic activity. NELF is funded by tax-deductible contributions from businesses, charitable foundations and individuals.

ALF is a public interest law organization whose mandate is to present balanced articulation of the public interest in cases that involve issues of law that are likely to have broad impact beyond the interests of the particular litigants, or that have public policy implications or are of significance in the development of principles of constitutional law. ALF has appeared before this Court, lower federal courts in several circuits, and state courts in many states as counsel for parties, intervenors, and amici in numerous cases involving issues of public interest, public policy and constitutional law. ALF represents individuals, civic and business organizations, small businesses, and on rare occasion, sizeable enterprises, in litigation, always without charging legal fees.

Because, like Petitioner Pacific Legal Foundation, NELF and ALF are engaged in litigating novel of theories of law which often depend for their success on persuading the courts to change prior law, Amici fear that the decision below, if allowed to stand, will create a risk that they, too, could be sanctioned for activities which are fully protected by the First Amendment.

NELF and ALF have requested the consent of the parties to the filing of their amicus brief in support of the petition for certiorari. The Petitioner, Pacific Legal Foundation, has consented, as evidenced by the letter from its counsel, Sidley & Austin, attached to the filing letter enclosed herewith. The Respondents have declined to give its consent.

Amici believes that it will present arguments in favor of granting certiorari which will not be presented by the parties to this action. Amici offer a broader perspective as to how the decision of the courts below will affect the practice of public interest law and the First Amendment rights of non-profit public interest organizations engaged in law reform litigation.

For the foregoing reasons, NELF and ALF pray that this Court grant their motion for leave to file the accompanying brief *amici curiae*.

DATED: Boston, Massachusetts: April 19, 1993.

Respectfully submitted,
New England Legal Foundation
By its attorneys,

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## BRIEF OF *AMICI CURIAE* NEW ENGLAND LEGAL FOUNDATION and ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

## INTEREST OF AMICI

The New England Legal Foundation ("NELF")is a not-for-profit public interest legal organization. Since its founding in 1977, NELF's mission has been to use litigation to promote free market values and to protect the economic rights and freedoms of New England's citizens. NELF locates and litigates, without charging a fee, precedent-setting cases involving individual and corporate economic and property rights and unconstitutional or illegal government regulation of economic activity. NELF is funded by tax-deductible contributions from businesses, charitable foundations and individuals.

The Atlantic Legal Foundation ("(ALF") is a public interest law organization whose mandate is to present balanced articulation of the public interest in cases that involve issues of law that are likely to have broad impact beyond the interests of the particular litigants, or that have public policy implications or are of significance in the development of principles of constitutional law. ALF has appeared before this Court, lower federal courts in several circuits, and state courts in many states as counsel for parties, intervenors, and amici in numerous cases involving issues of public interest, public policy and constitutional law. ALF represents individuals, civic and business organizations, small businesses, and on rare occasion sizeable enterprises, in litigation, always without charging legal fees.

Because, like Petitioner Pacific Legal Foundation ("PLF"), NELF and ALF are engaged in litigating novel of theories of law which often depend for their success on persuading the courts to change prior law, Amici fear that the decision below, if allowed to stand, will create a risk that they, too, as well as many other public interest organizations, could be sanctioned for activities which are fully protected by the First Amendment. Even the prospect of sanctions chills the exercise of their First Amendment rights.

Pursuant to Supreme Court Rule 37.2, NELF and ALF have obtained consent for the filing of this amicus brief from counsel for the Petitioner. Counsel for the Respondents has not consented, so a motion for leave to file this brief has been filed herewith.

## STATEMENT OF THE CASE

Amici accept and adopt the Petitioner's Statement of the Case.[1]

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[1]Amici take no position on the specifics of the actions for which PLF was sanctioned. Amici's knowledge of the facts of this action is limited to the discussions contained in the Petition and Appendix. Accordingly, Amici are unable to take any position as to whether the conduct of PLF's

(continued...)

## SUMMARY OF ARGUMENT

The issue of national importance at stake in this case is in what circumstances a trial court may resort to vaguely defined "inherent powers" to sanction alleged misconduct by a public interest law foundation in the conduct of public interest litigation concerning constitutional rights. Such litigation is political speech fully protected by the First Amendment against the chilling effect of vague and overbroad governmental action, including judicially imposed sanctions. A court should use its "inherent powers" only after finding that more precisely defined rules and statutes are inadequate due to an attorney's or a party's bad faith tactics. In this case, even if there were genuine misconduct, the court could have completely resolved the matter by applying Fed. R. Civ. P. 11 and 28 U.S.C. §1927. Unless reversed, the decision below will have a chilling effect on the efforts of many non-profit public interest law organizations, including Amici, to mount novel and difficult legal challenges to government action that threatens the rights of Americans.

## REASONS FOR GRANTING THE WRIT

I. FIRST AMENDMENT PRINCIPLES REQUIRE A COURT TO APPLY SPECIFIC RULES BEFORE RESORTING TO VAGUE "INHERENT POWERS" TO SANCTION A NON-PROFIT ORGANIZATION LITIGATING A PUBLIC INTEREST CASE.

A. *Public Interest Litigation is Political Speech Protected by the First Amendment.*

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[1](...continued)
attorney-employees was sanctionable. Amici contend that, even assuming arguendo the correctness of the findings of the magistrate and trial court, the courts below committed reversible error by applying the wrong legal principles to those facts.

It is well-established that public interest litigation engaged in by a non-profit law organization seeking to develop or change the law and to protect constitutional rights is political speech entitled to the full protection of the First Amendment. For public interest organizations like the ACLU, the NAACP, PLF[2] and Amici, "'litigation is not a technique of resolving private differences'; it is 'a form of political expression and political association.'" *In re Primus*, 436 U.S. 412, 428 (1978), *citing NAACP v. Button*, 371 U.S. 415, 429, 431 (1963). "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[3] *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971).

B. *The Government Can Restrict Public Interest Litigation Only by Specific Regulations Tightly Focused on Misconduct Unprotected by the Constitution.*

Because non-profit public interest litigation is political speech, it can be regulated only by precise rules that are much more narrowly directed to sanctionable conduct than is required for regulation of commercial litigation. "Where political expression or association is at issue this Court has not tolerated the degree of

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[2]PLF's attorneys have represented parties in many cases that involved novel theories of law, or required extension or elaboration of principles of constitutional law, or required creative and tenacious advocacy. Two cases of note which have reached this Court in recent years in which PLF attorneys argued successfully for a party challenging governmental action are *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Keller v. State Bar of California*, 496 U.S. 1 (1990).

[3]Collective litigation activity is equally protected whether the rights sought arise under the Equal Protection Clause or under the Takings Clause. *See Button*, 371 U.S. at 440, n. 19 (citing activities of National Lawyers Committee, a group created to litigate challenges to economic regulations as precedent for First Amendment protection of NAACP's right to litigate equal protection claims).

imprecision that often characterizes government regulation of the conduct of commercial affairs." *Primus*, 436 U.S. at 434, *distinguishing Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). Rather, "standards of permissible statutory vagueness are strict in the area of free expression." *Button*, 371 U.S. at 432. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433.

This strict rule of precision is intended to avoid the chilling effect on protected political speech which would occur if speakers feared being penalized for speaking out in ways that might or might not violate vaguely defined standards. "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect," *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977), of, e.g., six-figure sanctions imposed under a court's undefined inherent powers. Commercial speech, by contrast, is not "particularly susceptible to being crushed by overbroad regulation," *Id.* at 381, and so can be subjected to broad prophylactic rules. *See Ohralik*, 436 U.S. at 455-456, 458-459.

### C. *A Court Should Use Its "Inherent Powers" to Sanction Misconduct in Public Interest Litigation Only as a Last Resort.*

This Court has recognized that a court has "inherent powers" to sanction misconduct in some circumstances. The scope of these powers, which "necessarily result to our Courts of justice from the nature of their institution," *U.S. v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812), has never been delimited, although this Court has given some examples. *See Chambers v. NASCO*, 501 U.S. ---, 111 S.Ct. 2123, 115 L.Ed. 2d 27, 44-45 (1991). Indeed, a court's inherent powers necessarily elude clear definition since they include the reserve power to deal with extraordinary circumstances not covered by express rules. Merely saying that attorneys, parties, and perhaps unspecified other persons (such as PLF), must do nothing potential-

ly sanctionable under a court's "inherent powers" provides only a vague standard of conduct as compared to Rule 11 and §1927.

Rule 11 lays out a clearer, objective standard of reasonable inquiry. As this Court has pointed out, "Rule 11 was amended . . . precisely because the subjective bad-faith standard was difficult to establish." *Chambers*, 501 U.S. at --- n.11, 111 S.Ct. at 2133, 115 L.Ed. 2d at 46 (1991). Rule 11, which the trial court did not find applicable in this case, specifically is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Notes of Advisory Comm. on Rules, Federal Civil Judicial Procedure and Rules 36 (West, 1991). By contrast, the threat of sanctions under the court's inherent powers will likely have such an inhibitory effect on legal innovation because it is so difficult for attorneys to know in advance what is proscribed.

This Court has repeatedly stressed that "because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. ---, 111 S.Ct. at 2133, 115 L.Ed. 2d at 45 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). Even as to commercial litigation, a court usually should apply sanctions under Rule 11 before resorting to its broader but vaguer inherent powers.

> [W]hen there is bad faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court ordinarily should rely on the rules rather than the inherent power.

*Chambers*, 501 U.S. at ---, 111 S.Ct. at 2136, 115 L.Ed. 2d at 48. This follows from the principle that "inherent powers of federal courts are those which are *necessary* to the exercise of all others." *Roadway Express*, 447 U.S. at 764 (emphasis added). Where the court can apply power flowing from a specific rule such as Rule 11 or a statute such as §1927, the exercise of its inherent power is not "necessary." In *Chambers*, the sanctioned party in ordinary commercial litigation engaged in complex maneuvers both in and out of court that deliberately "emasculated and frustrated the purposes

of these rules and powers of the District Court." 111 S.Ct. at 2128, 115 L.Ed.2d at 39. In that context of deliberately evasive and malicious behavior this Court ruled that the court could resort directly to its inherent power because the full range of misconduct in and out of the courtroom could not be reached by Rule 11 and §1927. *Id.*, 111 S.Ct. at 2136, 115 L. Ed. 2d at 48-49. In such circumstances, it would waste judicial resources to first apply Rule 11 and §1927 to "discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct." *Id.*

*A fortiori*, when a court is supervising public interest litigation, First Amendment principles require that it rigorously adhere to the priority of specific Rule 11 and §1927 over general inherent power. "Broad prophylactic rules in the area of free expression are suspect. [Citations omitted.] Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 U.S. at 438. *Accord*, *Primus*, 436 U.S. at 434. While in ordinary commercial litigation such as *Chambers*, the profit motive provides some insulation against chilling effects of a court's invocation of its inherent powers, *see Chambers*, 501 U.S. at --- n. 11, 111 S.Ct. at 2133, 115 L.Ed. 2d at, 46, the chill is real in public interest litigation such as the instant case. *See, id.* 111 S.Ct. at 2145, 115 L. Ed. 2d at 60 (Kennedy, J. dissenting) (standardless and unchecked judicial power could be applied to chill rights of advocacy); *see Bates*, 433 U.S. at 383 ("since the advertiser . . . has a commercial interest . . . we have little worry that regulation to assure truthfulness will discourage protected speech"); *compare Primus*, 436 U.S. at 434, *with Ohralik* 436 U.S. at 458. In public interest litigation, the application of the court's inherent powers must be tested against the most stringent First Amendment standards.

Amici recognize, of course, that the court's inherent powers continue to be available in the extraordinary case to "fill in the interstices" of more specific rules. *Chambers*, 111 S.Ct. at 2134, 115 L.Ed. 2d at 46. Only if and after Rule 11 and §1927 are found to be inadequate to control abusive litigation conducted in bad faith can a court decide to resort to its "ultimate weapon" -- its inherent powers -- to control attorneys and parties who, like Mr. Chambers,

deliberately and in bad faith engage in a pattern of conduct designed to "emasculate" the court's other powers. *See Chambers*, 111 S.Ct. at 2138, 115 L.Ed. 2d at 39. No one should fear "chilling" the inclination to engage in such improper activities.

Given the unavoidable vagueness of inherent powers, which can reach misconduct not subject to Rule 11 or §1927, fairness and the First Amendment require that the court sanction someone using its inherent powers only *after* first warning him that if he persists in specifically defined bad faith misconduct he will be sanctioned. Where political speech is concerned, it would not be enough for a court merely to threaten that past conduct may be sanctioned at the end of the litigation or to threaten to sanction any future misconduct within the reach of its inherent powers.

"Non-profit, public interest litigation" is, of course, not a mantra that protects abusive litigation from all sanctions. A frivolous and abusive "public interest" suit is sanctionable if it is actually brought for a "malicious purpose or 'for private gain serving no public interest,'" *Primus*, 436 U.S. at 437, *citing Button*, 371 U.S. at 440. A useful analogy is *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964), where this Court quoted James Madison's statement that "the censorial power is in the people over the Government and not in the Government over the people." *Id.* at 282. The same principle should apply whether a citizen's criticism of government officials is expressed in a newspaper or a court. In *New York Times*, this Court ruled that a person criticizing a public official concerning official conduct is liable only if "the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not". Where the defendant is a corporate entity, it can be held liable only if the individuals who decided to publish did so with actual malice. *Id.* at 287. So, too, in the context of litigation, a person should not be penalized unless the court makes a specific finding of "actual malice": knowingly and in bad faith filing a false complaint or other pleading which evades control by Rule 11 or §1927.

D. *The Misconduct Alleged in this Case was Attorney Misconduct Which Could Have Been Sanctioned Under Rule 11 and 28 U.S.C. §1927.*

There is no dispute that Petitioner PLF is a non-profit public interest organization. Nor is there any dispute that in the underlying case it was assisting individuals to litigate claims that their constitutional rights were being violated. There is no evidence in the record that PLF was motivated by any commercial or selfish interest whatsoever. Even assuming, arguendo, that PLF was subject to the jurisdiction of the District Court at all,[4] the sanctions imposed on PLF must be tested against the First Amendment's rules for protection of political speech. The District Court below erred in three respects when it resorted to its inherent powers without first using Rule 11 or §1927.

First, the courts below applied an excessively vague standard when it exercised its inherent powers. It is not sanctions *per se* that chill legitimate public interest litigation, but rather the impossibility of knowing what conduct ultimately will be sanctioned. The courts below made no finding that the underlying suit was brought for a "malicious purpose or 'for private gain serving no public interest,'" *Primus*, 436 U.S. at 437 *citing Button*, 371 U.S. at 440. To the contrary, the District Court did not find that any of the plaintiffs who brought the case deserved to be sanctioned. The Ninth Circuit found that there was some merit to the suit. *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (reprinted as App. H. to Petition); A. A-19-A-20. Although the District Court warned counsel that if the action proved to be frivolous in whole or in part, the court would make someone pay for the defendant's time and resources, A. C-22, there appears to have been no prior warning to PLF that it would be sanctioned

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[4]PLF's petition for certiorari points out in detail why PLF, which was neither an attorney nor a party, was neither subject to the court's inherent power nor within its *in personam* jurisdiction. Amici have nothing to add to that discussion.

under the court's inherent powers if it persisted in specifically defined misconduct. The decisions below thus rest entirely on *ad hoc* and *post hoc* determinations that bad acts occurred, a result that offers no guidance to attorneys who wish to evaluate their future conduct against the possibility of sanctions.

Second, the Ninth Circuit apparently would not have held PLF itself sanctionable but for PLF's protected First Amendment activities. That court ruled that PLF could be sanctioned for the alleged misconduct because it believed that PLF, acting through its employees, contacted and organized the plaintiffs, A. A-6; funded the litigation to "establish a legal precedent," A. A-13; and provided attorneys for merely "nominal" plaintiffs, A. A-12-13.[5] But soliciting clients and litigating their claims to establish a general precedent are activities fully protected by the First Amendment. *Button*; *Primus*.

Third, avoiding an unconstitutional chill of protected political speech required the District Court to expend the time and effort to first apply the more precise standards of Rule 11 and §1927. Had it done so, it would have realized that, even if misconduct occurred below, each allegedly sanctionable act was an act of an attorney that could have been sanctioned under Rule 11 or §1927 or both. For all but one of the matters for which the Circuit Court imposed sanctions, the magistrate appointed as special master found that at least one individual attorney could have been sanctioned under 28 U.S.C. §1927. A. C-104-06. As to the remaining matter (the inverse condemnation claims of Mesa Ranch and Holter), the

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[5]Contrary to the implication that the plaintiffs had no real stake in the case, the plaintiffs undisputedly did have enough of a stake to have standing and to give the courts Article III jurisdiction to decide the case on the merits. *See Lockary v. Kayfetz*, 917 F.2d 1150 (App. H). The Ninth Circuit itself notes that the plaintiffs alleged that the challenged action of the Defendants prevented them from using valuable real property, A-6, an allegation which certainly gave them a substantial constitutional claim, *see Lucas v. South Carolina Coastal Commission*, --- U.S. ---, 112 S.Ct. 2286 (1992).

master based his conclusion entirely on pleadings filed and signed by individual attorneys named in his report. A. C-56-61. If these documents were as misleading as the master believed, then the attorneys who signed them could have been sanctioned under Rule 11. Yet neither the master nor the District Court ever applied Rule 11 to this supposed misconduct before resorting to the court's sweeping inherent powers. In short, this is not a case in which, because "neither the statute nor the rules are up to the task," the court may fall back on its inherent power.[6] *See Chambers*, 501 U.S. at ---, 111 S.Ct. at 2136, 115 L.Ed. 2d at 48-49.

It is not enough that a sanctioning court recite that public interest advocacy is constitutionally protected and should not be chilled, as did the Ninth Circuit, A. A-14, if the court then proceeds to levy chilling sanctions grounded on an organization's having engaged in such advocacy. *See Button*, 371 U.S. at 437-438. "This Court's duty is not limited to the elaboration of constitutional principles; [it] must also in proper cases review the evidence to make certain that those principles can be constitutionally applied." *Primus*, 436 U.S. at 434 *quoting New York Times v. Sullivan*, 376 U.S. at 285. *Accord*, *Ohralik*, 436 U.S. at 463 (this Court will make independent review of record). [7]

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[6]Even supposing that PLF as an entity could be subject to sanctions for specific misconduct in the course of the litigation, PLF could have been sanctioned only if the individual attorneys who made its strategic decisions themselves acted with "actual malice," i.e. only if they filed papers which they knew or should have known were false. *See New York Times v. Sullivan*. If that were so, then the court could have resolved the matter by sanctioning the attorneys personally under Rule 11 or §1927 with no need to use its inherent powers.

[7]The record concerning the sanction arising from the plaintiffs' antitrust claim may deserve such review. The magistrate below initially proposed that PLF be sanctioned for bringing an entirely frivolous suit; when the Ninth Circuit held that plaintiffs were entitled to a trial on the merits of some of their claims, *Lockary v. Kayfetz*, 917 F.2d at 1157, A. H-14, the

(continued...)

The decision below should be reversed and the trial court directed to apply a precise rule that safeguards First Amendment principles: namely, that the court not exercise its inherent powers unless it first apply Rule 11 and §1927 to all actions which may be subject to those specific provisions and then only use its inherent powers as to conduct which was clearly defined in a prior warning and was malicious and in bad faith.

## II. UNLESS REVERSED, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON PUBLIC INTEREST LITIGATION NATIONWIDE.

Despite the lip service that the courts below paid to this Court's First Amendment precedents, Amici fear that unless the decision below is reversed it will inhibit robust public interest litigation throughout the country.

The Ninth Circuit decision in effect establishes a rule that sanctions can be imposed on an organization if it allegedly recruits plaintiffs and funds litigation to make new law on an issue of broad public importance and if misconduct allegedly occurs in the course of that litigation. Such a rule, although facially neutral as between public interest organizations and private for-profit law firms, actually would have a much more severe impact on public interest organizations. Public interest organizations are much more likely to recruit clients who have small stakes in a major public issue; who lack sufficient resources to pay substantial legal fees; who require the organization's assistance in funding the litigation; and whose claims depend on novel legal theories too risky for private

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[7](...continued)
magistrate fell back on alternative theories, including a proposal to sanction PLF for bringing the antitrust claims, which were rejected on the merits as contrary to established precedents, A. A-21. Petition at 4, A. M-6-M-10. The Ninth Circuit upheld the sanction for bringing the antitrust claim, apparently because it concluded that PLF should have known that there was no basis for them.

attorneys to advance in contingency fee cases.

As this court's decision in *Button*, 371 U.S. at 433, acknowledges, public interest organizations, which typically get no financial reward even if they win,[8] will be relatively easily inhibited. Such organizations are motivated to bring cases by their hope to advance the law and their view of the public interest. However fierce a foundation's dedication to principle, in the real world the prospect that it could be betting its life on the outcome of a single case will necessarily be a significant deterrent. The deterrent effect of a single huge sanction, such as PLF has suffered, will extend beyond that specific case to engender fear in other organizations considering bringing many other cases. The First Amendment freedoms of organizations like NAACP, PLF and the Amici "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Button*, 371 U.S. at 433. *Compare Bates*, 433 U.S. at 380-81 (commercial litigation and advertising by for-profit firms not as susceptible to chill as political litigation is).

Amici NELF and ALF and their attorneys recognize and abide by their clear obligations under Rule 11 and §1927, but they fear that their First Amendment rights will be chilled if the Ninth Circuit's decision is allowed to stand as a precedent for sweeping use of "inherent powers" in their parts of the country. NELF and ALF often raise claims that require changing prior law to prevail. Their willingness to bring such suits would be inhibited if they had to worry about the crushing impact of heavy sanctions every time they plead a novel theory and vigorously advocate their clients' rights. And if firms like NELF and ALF, NAACP and ACLU, are silenced, ultimately it will be the public at large that will suffer a loss of their constitutional rights.

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[8]A non-profit public interest law firm does not lose the full protection of the First Amendment if it is sometimes awarded attorneys' fees by the court under, e.g. 42 U.S.C. §1988, or if contributions to the firm rise when it wins a case. *Primus*, 436 U.S. at 429-431.

## CONCLUSION

For the reasons stated above, Amici the New England Legal Foundation and the Atlantic Legal Foundation respectfully request this Court to grant the petition for writ of certiorari and reverse the decision of the Ninth Circuit.

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Respectfully submitted,
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